No. 76-1239

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1976

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MICHAEL WILLIAM SCHULTZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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LAWRENCE G. WALLACE,
*Acting Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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Petitioner contends that the definition of "daytime" in Rule 41(h) of the Federal Rules of Criminal Procedure creates an unconstitutional irrebuttable presumption and that the district court violated Rule 32(c)(3)(A), Fed. R. Crim. P., by refusing a defense request to read the pre-sentence investigation report before sentence was imposed.

After a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846. He was sentenced to eight years' imprisonment, to be followed by a three-year special parole term (Pet. App. 1a-2a). The court of appeals affirmed (Pet. App. 3a-4a).

1. The evidence against petitioner was obtained as a result of a search of his farmhouse pursuant to a warrant

issued to Drug Enforcement Administration agents at 5:25 p.m. on December 11, 1975. The agents arrived at the farmhouse at 6:30 p.m. and commenced the search at 7:15 p.m., at which time it was dark. Petitioner contends (Pet. 9-15) that this search violated Rule 41(c) of the Federal Rules of Criminal Procedure because the warrant did not expressly authorize execution other than in the daytime.

As the court of appeals correctly noted (Pet. App. 3a), however, Rule 41(h), Fed. R. Crim. P., defines "daytime," for purposes of Rule 41(c), "to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time." Thus, the search in this case took place in the "daytime," within the meaning of Rule 41. Petitioner's challenge to the definition in Rule 41(h) as an unconstitutional "irrebuttable presumption of a finding of 'daytime' which is often contrary to fact" (Pet. 11) incorrectly assumes that the Fourth Amendment requires that a search warrant expressly provide for nighttime execution. See *Gooding* v. *United States*, 416 U.S. 430. Although Rule 41 does impose such a requirement, it also limits its scope. The definition of "daytime" in Rule 41(h) is fully responsive to the considerations underlying the need for express authorization in Rule 41(c), since the greater expectation of privacy from governmental intrusion during the nighttime arises from the lateness of the hour rather than the absence of sunlight.

2. Petitioner contends (Pet. 16-18) that the district court violated Rule 32(c)(3)(A), Fed. R. Crim. P., by refusing to allow his counsel to read the presentence report before sentence was imposed. Rule 32(c)(3)(A) provides, however, that the court must permit the defendant or his counsel to view the presentence report only "upon request." See *United States* v. *Hodges*, 547 F. 2d 951, 952 (C.A. 5); *United States* v. *Cox*, 485 F. 2d 699, 700 (C.A. 5); *Gallo* v. *United States*, 461 F. 2d 1008 (C.A. 8); *United States* v. *Baker*, 429 F. 2d



1344, 1348 (C.A. 7). Nothing in the files or records of this case reflects a request by petitioner to see his presentence report prior to the imposition of sentence. Although petitioner asserts (Pet. 7) that his counsel, in chambers, orally requested to read the presentence report before sentencing, there is no reason to believe that the trial judge, who carefully followed all required procedures in pronouncing sentence (see Tr. 5-8),[1] would have denied that request in clear disregard of Rule 32(c)(3)(A).

Moreover, the transcript of petitioner's sentencing suggests that no such request was made. If, as petitioner now alleges, the district court had refused to allow his counsel to view the presentence report, in violation of Rule 32(c), counsel presumably would have attempted to make his request and the court's denial a matter of record prior to the imposition of sentence. Furthermore, if, as petitioner claims, the court had offered to permit inspection of the presentence report once sentence had been imposed, it is likely that defense counsel would have renewed his request immediately after sentencing. The sentencing transcript shows that petitioner's attorney took neither action.

In any event, in the absence of a complete record resolution of the factual question whether petitioner's counsel requested an opportunity to see the presentence report prior to sentencing is impossible at this stage of the proceedings. Petitioner's appropriate course is a motion to correct his sentence, pursuant to Rule 35, Fed. R. Crim. P., which would allow the district court to conduct an evidentiary hearing on petitioner's allegations, if appropriate, and, if necessary, to resentence petitioner.[2]

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[1]"Tr." refers to the transcript of petitioner's sentencing on June 21, 1976, a copy of which is being lodged with the Clerk of this Court.

[2]Petitioner's further contention (Pet. 7-8) that the district court relied in sentencing on material inaccuracies in the presentence

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE,
*Acting Solicitor General.**

MAY 1977.

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report, if correct, may also entitle him to relief under 28 U.S.C. 2255. See *Townsend* v. *Burke*, 334 U.S. 736. This claim also is not ripe for review on the present record.

*The Solicitor General is disqualified in this case.